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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID NORKIN

Plaintiff,

-against-

Civil Action No. 05 Civ. 9137(DC)

DLA PIPER RUDNICK GRAY CARY LLP,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO TRANSFER TO THE DISTRICT OF CONNECTICUT
(28 U.S.C. § 1412)

Defendant DLA Piper Rudnick Gray Cary LLP ("Piper") moves this Court for an Order, pursuant to 28 U.S.C. § 1412, transferring this action to the District of Connecticut, the district in which the personal bankruptcy of David Norkin ("Norkin'), the bankruptcy of Britestarr Homes, Inc. ("Britestarr") , and the related adversary proceeding, Britestarr Homes, Inc. v. Piper Rudnick LLP, are all currently pending. As set forth further below, it is neither in the interest of justice nor convenient for the parties for this case to proceed in a forum other than Connecticut.

I. PROCEDURAL BACKGROUND

Because Norkin's claims against Piper arise out of events occurring in Norkin's personal bankruptcy and in the Britestarr bankruptcy, Piper provides a brief overview of pertinent events that have occurred in both these bankruptcies.[1]

On or about January 9, 1997, David Norkin filed a voluntary bankruptcy petition in the Bankruptcy Court for the District of Connecticut. See Declaration of Jean Lewis ("Lewis Decl."), Ex. 1, line 1. In March 2002, the United States of America moved on behalf of the Internal Revenue Service ("IRS") to convert Norkin's bankruptcy case to a Chapter 7 liquidation case, citing Norkin's failure to file federal tax returns despite his receipt of significant earned income, as well as his failure to file monthly operating reports with the bankruptcy court. Id., line 196. On May 23, 2002, the Bankruptcy Court for the District of Connecticut, Judge Shiff presiding, granted the IRS's motion and appointed Ronald Chorches as the trustee for Norkin's estate. Id., line 215.

At or around the same time, at Norkin's direction, Britestarr filed for bankruptcy in the Bankruptcy Court for the Southern District of New York. Lewis Decl., Ex. 2, line 1. Britestarr moved for the appointment of a Chapter 11 trustee on May 21, 2002. Id., line 2. Before a trustee could be appointed, however, Britestarr's bankruptcy was transferred to the District of Connecticut, on the order of Judge Shiff. Id., line 10. On the same day, Norkin's trustee signed a resolution removing Norkin as the sole director of Britestarr and replacing him with Steven

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[1] The Court can take judicial notice of each of the procedural events described in this section. Fed. R. Evid. 201(b). However, for ease of reference, Piper has attached the docket reports for Norkin's and Britestarr's bankruptcies, and for the Britestarr v. Piper adversary proceeding, as Exhibits 1,2, and 3, respectively, to the declaration in support of this motion.

Smith. Lewis Decl., Exhibit 4. Smith subsequently exercised his authority as Britestarr's sole director to remove Norkin as Britestarr's president. Id., Exhibit 5.

Close to one year later, on or about April 25, 2003, Britestarr, under new direction, moved for the appointment of Michael Caddell and his law firm ("Caddell") as Britestarr's special counsel to investigate claims against Piper, Norkin and Britestarr's financial advisors. Id., Exhibit 2, line 103; Application to Employ Michael Caddell, Esquire, as Special Counsel, ¶ 14. On June 3, 2003, Judge Shiff authorized Britestarr to retain Caddell to "investigate and file actions under the terms and conditions set forth in the Application . . ." Lewis Decl., Exhibit 2, line 121; Order Authorizing Employment of Special Counsel.

On or about July 31, 2003, Britestarr filed a complaint against Piper, asserting, inter alia, that "the acts of Norkin along with Piper's assistance and counsel cost [sic] Britestarr to loose [sic] a tremendous business opportunity . . . and forced Britestarr into financial disarray and eventual bankruptcy." Lewis Decl., Exhibit 6, ¶ 2. Britestarr contends that "Piper assist[ed] Norkin in converting Britestarr funds for his personal use" by releasing funds from a Britestarr account to Norkin between March 2000 and March 2002. See id., ¶¶ 67-126. The Britestarr Complaint includes separate claims that Piper aided and abetted Norkin in the breach of his fiduciary duty to Britestarr, see id., ¶¶ 137-40, and conspired with Norkin in the breach of his fiduciary duty to Britestarr. Id., ¶¶ 141-46.[2]

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[2] Britestarr subsequently filed an amended complaint that dropped claims that Piper converted and aided Norkin's conversion of Britestarr funds. Britestarr's amended complaint, however, still included claims that Piper aided and abetted Norkin's breach of fiduciary duty and conspired with Norkin for the same purpose.

Britestarr, however, has never filed a claim against Norkin. Instead, on October 26, 2004, Britestarr's attorneys entered into a joint prosecution agreement with Norkin's former attorney, pursuant to which the attorneys "agreed to cooperate with one another to advance the claims of their respective clients against the common defendant, Piper." See Lewis Decl., Exhibit 7, p. 2. Under the terms of the agreement, Britestarr's special counsel agreed to assist Norkin's attorney "or another attorney that Mr. Norkin retains as trial counsel in pursuit of Mr. Norkin's claims against Piper," including "assist[ing] Mr. Norkin's litigation counsel when drafting the initial complaint, drafting discovery, or preparing for depositions," in exchange for a twenty percent (20%) interest in any recovery by Mr Norkin. Id. at p. 2, ¶ 1.a.

Norkin, in turn, agreed to assist Britestarr in its claims against Piper by "periodically updat[ing] Caddell on the facts uncovered during discovery in Mr. Norkin's suit against Piper," and by making himself available for deposition on the following day. Id. at ¶ 1.b. In exchange for these periodic updates and his deposition testimony, Norkin received a "fifteen percent (15%) interest in the rights of Oak Point Property, Inc.[3] to receive proceeds from Britestarr's recovery against Piper. Id. Additionally, according to the terms of the agreement, in November 2004 Britestarr's special counsel advanced Norkin "an initial one-time amount of $10,000 . . . to help finance the filing of Norkin's lawsuit against Piper." Id., ¶ 2.b. The agreement requires that Britestarr's counsel continue advancing a monthly payment of $3,000 to Norkin's litigation counsel until Norkin's suit against Piper is resolved. Id.

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[3] According to Britestarr's confirmed plan of reorganization, Oak Point Property, Inc., is the owner of Britestarr's shares and will be the owner of Britestarr's successor. See Second Amended Disclosure Statement of Britestarr Homes, Inc., March 31, 2004, p. 18 and Schedule 7.1 to Second Amended Chapter 11 Plan, March 31, 2004.

In November 2004, discovery ended in Britestarr v. Piper. During the course of discovery in that matter, the parties took more than thirty depositions and reviewed tens of thousands of pages of documents.

On April 13, 2005, Piper filed a motion for summary judgment in Britestarr v. Piper. Lewis Decl., Exhibit 3, lines 151-53. The District Court subsequently withdrew its reference of the case to the Bankruptcy Court. Id., line 159. Piper's motion for summary judgment has now been fully briefed and is currently pending before Judge Underhill in the District of Connecticut.

II. APPLICABLE LAW

As set forth in Piper's opposition to Norkin's motion to remand, the claims in Norkin's complaint arise in Norkin's personal bankruptcy and Britestarr's bankruptcy and are, accordingly, core proceedings. See Defendant's Opposition to Motion to Remand, Parts I.A. and B. Thus, the applicable statute for purposes of Piper's motion to transfer is 28 U.S.C. § 1412. In re Iridium Operating LLC, 185 B.R. 822, 835 (Bankr. S.D.N.Y. 2002) ("Where a party seeks to transfer venue for a core proceeding, the applicable statute is 28 U.S.C. § 1412").

Section 1412 allows transfer "to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. The factors considered by a district court in its assessment of a motion to transfer under 28 U.S.C. § 1412 are "substantially the same factors as for a motion to transfer under 28 U.S.C. § 1404(a)." Official Committee of Asbestos Claimants v. Heyman, 306 B.R. 746, 749 (S.D.N.Y. 2004) (citing In re McCrory Corp., 160 B.R. 502, 507 n.2 (S.D.N.Y. Bankr. 1993)). They include:

> (1) the plaintiff's choice of forum; (2) the locus of the operative facts; (3) convenience and relative means of the parties; (4) convenience of witnesses, (5) the availability of process to compel the attendance of witnesses; (6) the location

> of physical evidence; (7) the relative familiarity with the governing law; and (8) the interests of justice, including the interests of trial efficiency.

Goggins v. Alliance Capital Management, L.P., 279 F. Supp.2d 228, 232 (S.D.N.Y. 2003) (internal quotation omitted).

Under either section, a district court has "broad discretion to grant or deny motions to transfer and makes its determination based on 'notions of convenience and fairness on a case-by-case basis.'" Securities and Exchange Commission v. KPMG, LLP, 2003 WL 1842871 (S.D.N.Y. 2003) (quoting In re Cuyahoga Equip. Corp., 980 F.2d 110, 117 (2d Cir. 1992) (additional citation omitted)); see also In re Manville Forest Products Corp., 896 F.2d 1384, 1391 (2d Cir. 1990).

There are, however, distinctions between a motion to transfer brought under 28 U.S.C. § 1412 and a motion to transfer brought pursuant to 28 U.S.C. § 1404. First, under § 1412, there is no requirement that the proponent of transfer establish that plaintiff could have brought his suit in the transferee district. Compare 28 U.S.C. § 1412 with 28 U.S.C. 1404. See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3845, p. 340 (observing that § 1404's limit on transfer to districts in which plaintiff could have brought his suit "does not appear in other similar transfer provisions").

Second, in the context of a motion under § 1404, a plaintiff ordinarily enjoys a "presumption in favor of [his or her] choice of forum." See, e.g., VictoriaTea.com, Inc. v. Cott Beverages, Canada, 239 F. Supp.2d 377, 381 (S.D.N.Y. 2002). Under § 1412, however, that presumption is effectively neutralized by the presumption that "the district in which the underlying bankruptcy case is pending is . . . the appropriate district for hearing and determination of a proceeding in bankruptcy." In re Manville Forest Products Corp., 896 F.2d 1384, 1391 (2d Cir. 1990); see also Official Committee of Asbestos Claimants v. Heyman, 306 B.R. 746, 750 (S.D.N.Y. 2004) ("the two presumptions effectively cancel each other out"). Consequently, in determining the merits of a motion to transfer under § 1412, the district court must balance the factors enumerated above without affording any extra weight to plaintiff's choice of forum.

III. TRANSFER TO THE DISTRICT OF CONNECTICUT IS IN THE INTERESTS OF JUSTICE

A review of the factors outlined above in the context of Norkin's claims demonstrates that both the interests of justice and the convenience of the parties require transfer of the instant case to the District of Connecticut.

A. Plaintiff's choice of forum

As noted above, although Norkin chose New York as the forum in which to file his lawsuit against Piper, any presumption in favor of that choice is cancelled out by the presumption that this core proceeding should be heard in the same district in which the underlying bankruptcies are pending – the District of Connecticut. Norkin's choice of forum is entitled to even less weight in the instant matter because this suit is being funded by special counsel for Britestarr – an attorney who has been retained by a corporation in Connecticut to bring a lawsuit against Piper in Connecticut. Considered together with the fact that Norkin's home is less than one hour from the federal court in Bridgeport, Connecticut,[4] Norkin's choice to file in New York appears to be a calculated decision on both his part and Britestarr's to keep his suit separate and apart from Britestarr's suit, while working together behind the scenes against Piper.[5] Norkin's choice of forum, if it is in fact Norkin's choice, is entitled to no weight in the current case.

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[4] According to Mapquest, a drive from Norkin's home at 2 Hillside Crescent, New Rochelle, New York to the federal court house in either Bridgeport (915 Lafayette Boulevard, Bridgeport, Connecticut 06604) or in Manhattan (500 Pearl Street, New York, New York 10007) should take under an hour. See www.mapquest.com.

B. Locus of the operative facts

The "operative facts" in the instant matter are a subset of the facts at issue in the adversary proceeding brought by Britestarr against Piper in the District of Connecticut: Whether the fact of Britestarr's bankruptcy has damaged Britestarr; whether Britestarr had any viable alternatives to bankruptcy in May 2002; and whether Norkin, as president of Britestarr, would have accepted any of those alternatives are all issues that are currently being litigated in the District of Connecticut in Britestarr v. Piper.

The locus of those operative facts shifted from New York to Connecticut when Britestarr's bankruptcy was transferred to Connecticut in 2002, when Britestarr filed its suit against Piper in Connecticut, and when Britestarr moved its headquarters to Connecticut. Additionally, critical witnesses as to each of the issues identified above are in Connecticut: Britestarr, as stated above, is now in Connecticut, as is Matthew Beatman, Norkin's representative in the meetings at which an alternative to bankruptcy was allegedly proposed.

The other operative fact at issue in Norkin's complaint – whether Norkin had any hope of employment with Britestarr beyond May 2002 – is also centered in Connecticut. Whether Norkin could have continued in his role as president of Britestarr subsequent to the conversion of his personal bankruptcy from Chapter 11 to Chapter 7 is an issue that will be addressed with the trustee of Norkin's estate, another witness headquartered in Connecticut.

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[5] As set forth further, infra, one reason Norkin and Britestarr would want to keep their suits apart is that the allegations in their complaints are inconsistent.

This factor favors transfer of the case to Connecticut.

C. Convenience and relative means of the parties

As things stand currently, Piper must defend itself against the inconsistent claims of Norkin and Britestarr in two different forums while, at the same time, Norkin and Britestarr are working together against Piper behind the scenes. Beyond inconvenient, the current scenario exposes Piper to the possibility of inconsistent verdicts and damages awards.

Any inconvenience to Norkin caused by transferring this matter to Connecticut pales by comparison. Piper's motion proposes a transfer to Bridgeport, Connecticut, approximately 40 miles from Norkin's home, see supra, n.4, not a transfer across the country. Considered together with the fact that Connecticut is the district in which Norkin filed a voluntary petition for bankruptcy and in which his personal bankruptcy is still pending, Norkin cannot claim that litigation in Connecticut is any less convenient for him than in New York.

This factor favors transfer to Connecticut.

D. Convenience of witnesses

Again, because Bridgeport is so close to New York, any inconvenience caused by the transfer of this case to Connecticut would be minimal for any witnesses in New York. Regardless, the witnesses most critical to Norkin's claims are in Connecticut. Britestarr, as stated above, is now headquartered in Connecticut. Chorches, who determined as Norkin's trustee to remove Norkin as Britestarr's sole director in June 2002, is in Connecticut. And, Matthew Beatman, Norkin's personal bankruptcy attorney is in Connecticut, along with the countless other attorneys and professionals who have witnessed the various steps taken in the Norkin and Britestarr bankruptcies. This factor favors transfer to Connecticut.

E. Availability of process to compel the attendance of witnesses

Given the close proximity of the federal courthouses in Manhattan and Bridgeport, there is no apparent difference in the availability of process to compel the attendance of witnesses at trial in Connecticut or in New York. Accordingly, this factor favors neither district.

F. Location of physical evidence

The vast majority of Piper's records were produced to Britestarr's attorneys in Connecticut in the context of the Britestarr bankruptcy. Norkin will presumably have access to those documents, if he has not already, as a result of the joint prosecution agreement he entered into with Britestarr's special counsel. Additionally, Britestarr's corporate records, the court records for Norkin's bankruptcy, the court records for Britestarr's bankruptcy, and the court records from the Britestarr v. Piper adversary proceeding, are all stored in Connecticut. This factor favors transfer to Connecticut.

G. Relative familiarity with the governing law

Because Norkin's claims concern a subset of the issues in Britestarr v. Piper, a suit already pending in Connecticut, the District Court in Connecticut will necessarily become familiar with the law governing Norkin's claims and Piper's defenses.[6] This factor favors transfer to Connecticut.

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[6] To the extent New York state law applies to Norkin's claims, the issues are neither complex nor unique.

H. Interests of justice

More than any other factor, the interests of justice strongly favor transfer of this case to the District of Connecticut. Norkin's lawsuit against Piper is being funded by the special counsel retained by Britestarr in Connecticut (as authorized by the Bankruptcy Court for the District Court of Connecticut) to investigate and bring claims on behalf of Britestarr against Piper, Norkin, and other professionals in Connecticut. Although Britestarr's complaint against Piper maintains that Piper wrongfully released Britestarr's money to Norkin, see Lewis Decl., Ex. 6, ¶¶ 69-128, that Piper conspired with Norkin to breach Norkin's fiduciary duties to Britestarr, id., ¶¶ 141-146, and that Piper "demonstrated that its loyalty lay, as it always had, not with Britestarr, but with Norkin," id., ¶ 132, Britestarr's special counsel is paying for Norkin to bring a suit against Piper that alleges that Piper wrongfully advised him to resign as Britestarr's president and caused him to lose future salary as as Britestarr's president. Norkin Complaint, ¶ 23.

Pursuant to the joint prosecution agreement between Norkin and Britestarr's special counsel, Norkin will share in any recovery that Britestarr realizes on its claim that Piper wrongfully released funds to Norkin. Lewis Decl., Ex. 7, p. 2, ¶ 1.b. Just as troubling, Britestarr's special counsel will share in any recovery that Norkin realizes as a result of Norkin's claim that Piper wrongfully advised Norkin to resign as Britestarr's president, id., p. 2, ¶ 1.a., despite Britestarr's diametrically opposed claim that Piper's loyalty lay with Norkin, id., ¶ 132, and that "the acts of Norkin along with Piper's assistance and counsel cost Britestarr to loose [sic] a tremendous business opportunity . . . and forced Britestarr into financial disarray and eventual bankruptcy." Id., ¶ 2.

Given the relationship between Britestarr's counsel and Norkin, these two separate suits and their irreconcilable claims simply cannot be allowed to proceed in separate forums consistent with the interests of justice. This factor favors transfer of this matter to the District of Connecticut.

IV. CONCLUSION

For all the foregoing reasons, both the interests of justice and the convenience of the parties favor transfer of this action to the District of Connecticut.

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